DEPARTMENT OF THE ARMY
HEADQUARTERS UNITED STATES ARMY FORCES COMMAND
1777 HARDEE AVENUE SW
FORT MCPHERSON GEORGIA 30330-1062

REPLY TO
ATTENTION OF

AFLG-PRO 10 Jun 98

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Contracting Information Letter (CIL) 98-29, Military Dining Facility Contracts

1. References:

a. Randolph Sheppard Act (as amended)
b. Inapplicability of the Randolph-Sheppard Act to appropriated Fund Military Dining Facilities, SARD-PS Memorandum, 11 May 1998
c. Applicability of Randolph-Sheppard Act to Military Dining Facilities, DAJA-KL Memorandum, 25 February 1998

2. The Army recently issued policy regarding the acquisition of services to operate military dining facilities that use appropriated funds. Policy is effective immediately. The full text policy is at enclosure 1. Accordingly, CIL 97-44, paragraph 4 is rescinded.

3. Requests by State Licensing Agencies for an opportunity to compete for appropriated fund military dining facility contacts under the provisions of the Randolph-Sheppard Act, or notices from the Department of Education of arbitration proceedings shall be forwarded to the HQDA, ATTN: SARD-PS, (Mr. Ray Kelly), Skyline 6, Suite 916, 5109 Leesburg Pike, Falls Church, Virginia 232041-3201 immediately upon receipt. Concurrently, provide a copy to the PARC office.

4. The Chief, Logistics & Contract Law Branch, LTC Passar, provided an excellent legal analysis of the applicability of the Randolph-Sheppard Act, 20 U.S.C. 107-107f. Enclosure 2 provides the full text of the analysis.

AFLG
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5. The Office of the Inspector General (IG), Department of Defense conducted an audit of selected contracts for Food Service Contracts at DoD Dining Facilities in the Air Force and the Army. The IG reviewed food service contracts at Fort Campbell, Sheppard Air Base and Vandenburg Air Force Base. Although the Army did not agree with all the final audit results, the IF issued the following determinations:

a. The Army and Air Force paid fair and reasonable prices for DoD dining facility food service contracts that were awarded under the Randolph-Sheppard Program. The price for contracts awarded under the Randolph-Sheppard Programs was in accordance with applicable laws and regulations. The prices included costs that were unique to the respective program; however, the costs were allowable and in accordance with established program policies.

b. For the contracts reviewed, the DoD properly used funds appropriated for food service contracts at DoD facilities. The IG conducted discussions with contracting and payment officials and found no indication that DoD diverted any funds appropriated for DoD dining facilities to fund nonappropriated activities.

2 Encls

CHARLES J. GUTA
Colonel, AC
Chief, Contracting Div, DCSL&R
Principal Assistant Responsible
for Contracting

MAY 2 0 1998

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
RESEARCH DEVELOPMENT AND ACQUISITION
103 ARMY PENTAGON
WASHINGTON DC 20310-0103

11 MAY 1998

REPLY TO
ATTENTION OF

SARD-PS

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Inapplicability of the Randolph-Sheppard Act to Appropriated Fund Military Dining Facilities

The purpose of this memorandum is to set forth Army policy regarding the acquisition of services to operate military dining facilities that use appropriated funds.

We have reviewed the Randolph-Sheppard Act (the Act), 20 U.S.C. sections 107 – 107f, Vending Facilities for Blind in Federal Buildings, its legislative history and usage, and find that the Act is not applicable to appropriated fund military dining facilities. A copy of the legal analysis that underpins that finding is available upon request.

The purpose of the Act is to provide blind persons with remunerative employment by authorizing them to operate vending facilities on Federal property. The Act states that the operation of vending facilities such as automatic vending machines, cafeterias, snack bars, cart services, shelters, and counters is "for the vending of newspapers, periodicals, confections, tobacco products, foods, beverages and other articles or services dispensed automatically or manually ...." Vending is the transfer to another for a money equivalent . . . to sell.

The Act was amended in 1974 to include "cafeterias" in the listing of vending facilities. Relevant DOD and Army regulations were also amended to reflect the change. For over 20 years the Act's contracting priorities have been properly applied to cafeterias that are vending facilities; in such cafeterias food and beverages are sold to the customer -- not procured through a contract using appropriated funds.

In the early 1990's, the Act's preference for blind individuals to operate vending facilities began to be mistakenly applied to appropriated fund military dining facility contracts. The expanded application of the Act's preferences to appropriated fund contracting is not supported by the original Act, the Act's last amendment in 1974, DOD regulations, or Army regulations.

Encl 1

Appropriated fund military dining facilities are not vending facilities; nothing is transferred to the consumer by immediate sale. The primary mission of a military dining facility is to prepare and serve food previously purchased by the agency with appropriated funds to eligible consuming soldiers. This mission may be accomplished by military or civilian Government personnel, or by contract with a commercial firm for a specified period of time using appropriated funds -- in which case both the Federal Acquisition Regulation (FAR) and department specific supplements would apply.

The recent inappropriate expansion of the Act's priorities has brought the Army into direct conflict with State Licensing Agencies for the blind (SLA's) and with the Department of Education -- and has resulted in costly Federal Court suits and arbitration proceedings. The problem created by misapplication of the Act is amplified when appropriated funds are subjected to a regulatory requirement that the contract be awarded to the SLA if it submits a proposal that is within the competitive range. Such a procedure thwarts the Competition in Contracting Act's (CICA) emphasis on cost and value when obligating appropriated funds.

In addition, opening appropriated fund military dining facility food service solicitations to participation by SLAs precludes set-asides mandated by the Small Business Act (SBA) and frustrates the contracting priorities of disabled persons under the Javits-Wagner-O'Day Act (JWOD). CICA, SBA and JWOD, all of which were enacted to apply to appropriated fund procurements, have been implemented by the FAR. The Randolph-Sheppard Act, which is not intended to be applied to appropriated funds, has not.

To remedy the current confusion regarding the applicability of the Randolph-Sheppard Act to appropriated fund military dining facility contracting, we have proposed a clarifying amendment to the Act. DOD has joined the Army in our proposal to amend the Act. As noted, this is a clarifying amendment; it is not an attempt to alter what Congress clearly intended when the Act was passed and amended. Consequently, the policy stated below is not dependent on the legislative proposal.

Accordingly:

a. Appropriated Fund Military Dining Facility food service requirements will be acquired in accordance with FAR and its supplementation. The Randolph-Sheppard Act shall not be used to satisfy those requirements.

b. Existing contracts that were awarded under the Act do not necessarily reflect the best value that would have been obtained if the act had not been applied. Therefore such contracts shall be reviewed with particular scrutiny, using best value principles specified in FAR Part 17, prior to the exercise of contract options. If it is determined that the exercise of the contract option is not in the Government's best interest, the priorities for awards established by FAR Subparts 8.7, 19.5 and 19.8 will be observed in the reprocurement action.

c. Requests by SLAs for an opportunity to compete for appropriated fund military dining facility contracts under the provisions of the Randolph-Sheppard Act, or notices from the Department of Education of arbitration proceedings, shall be forwarded to this office (HQDA, ATTN: SARD-PS (Mr. Ray Kelly), Skyline 6, Suite 916, 5109 Leesburg Pike, Falls Church, Virginia 22041-3201) for response.

Your cooperation in enforcing the policy set forth above is required in order to return sound business practices to the acquisition of food services for Army military dining facilities.

My point of contact on this policy is Ray Kelly, DSN 761-7563, kelly@sarda.army.mil.

Kenneth J. Oscar
Acting Assistant Secretary of the Army
(Research, Development and Acquisition)

DAJA-KL 1998/3122 (27-1a) 25 February 1998

MEMORANDUM THRU COL Kevin E. O'Brien, Chief, Contract Law Division, Office of The Judge Advocate General

FOR Mr. Levator Norsworthy, Deputy General Counsel for Acquisition

SUBJECT: Applicability of Randolph-Sheppard Act to Military Dining Facilities

This responds to your request for a legal analysis of the applicability of the Randolph-Sheppard Act, 20 U.S.C. §§ 107 – 107f, to food service contracts at military dining facilities. As we discussed last week, in a recent arbitration in Alaska the Army took the position that the Act is not applicable to such contracts. My analysis of the issue follows.

In contrast to the mandates in Title 41 (including priority programs such as the Javits-Wagner-O'Day Act), Title 10, the Small Business Act, and other statutes to federal agencies in procuring their own requirements, the Randolph-Sheppard Act is a Title 20 Education program intended to provide entrepreneurial opportunities to blind vendors licensed by state agencies by giving them a priority to sell foodstuffs and other items to federal employees in facilities of certain sizes. Note that the Act is not now, and to my knowledge has never been, included in the annual compilation of Laws Relating to Federal Procurement prepared for the House Committee on National Security by the House Office of Legislative Counsel.

The Randolph-Sheppard Act originally covered vending machines and vending stands but was expanded in 1974 to include giving blind vendors a priority to operate cafeterias in federal facilities. Section 107d-3(e) of the Act directs the Secretary of Education to prescribe regulations establishing such a priority for operating cafeterias on federal property when it is determined that such operation can be provided at a reasonable cost with food of a high quality comparable to that currently provided to employees. The Act and implementing regulations do not state that military mess halls, in which food is served free to eligible service members, constitute cafeterias within the intended scope of the Act. Whether such mess halls fall within the scope of the Act has been the subject of much debate in recent years. I do not believe that the conclusion of some that the Act does apply to such operations is based on a sound analysis of the legislative language and intent.

For more than 50 years since its enactment in 1938, no one seriously suggested that the Randolph-Sheppard Act applies to procurements by a federal agency of services to prepare and deliver government-owned foodstuffs to authorized personnel, without charge, as part of the operational expenses of the agency. That is because the intent of the Act is to provide blind vendors an advantage in **selling** food, tobacco, and other sundries to the somewhat "captive" markets of federal employees working in

relatively large federal buildings. In essence, the Act provides a priority to blind vendors to obtain a "concession" permit or license to serve individual customers working in or visiting the federal facility.

The plain language of the statute indicates its intended scope. See GAO Office of the General Counsel, Principles of Federal Appropriations Law, 2d ed. (1991), Vol. I, Ch. 2, at pp. 60-61, and cases cited therein. The Randolph-Sheppard Act is set out in Chapter 6A of Title 20, entitled "Vending Facilities for Blind in Federal Buildings." The statute authorizes blind persons "to operate **vending** facilities on any Federal property." 20 U.S.C. § 107(a) (emphasis added.) "Vending," though not defined in the statute, should be given its ordinary and usual meaning. Caminetti v. U.S., 242 U.S. 470, 485 (1916). This means the **sale** of an item, its transfer to another for a pecuniary equivalent. See Black's Law Dictionary (6th Ed. 1990) at p.1555. Section 107a(a)(5) of the Act provides for state licensing of blind persons for the operating of vending facilities for the **vending** of newspapers, periodicals, confections, tobacco products, foods beverages, and other articles or services dispensed automatically or manually and prepared on or off the premises in accordance with all applicable health laws."[1] The only services mentioned in the statute are "cart services," implicitly from which items are sold to customers in the facility. **Vending** facilities are defined in §107e(7) as "automatic vending machines, cafeterias, snack bars, cart services, shelters, counters, and such other appropriate auxiliary equipment ... necessary for the **sale** of the articles or services described in section 107a(a)(5)." (emphasis added) That the sale of items is essentially, indeed exclusively, what Congress envisioned is also apparent from the statutory mandate that the state agency licensing the vendor must agree "to provide for each licensed blind person such vending facility equipment, **and adequate initial stock of suitable articles to be vended therefrom,**" as may be necessary to conduct the vending operation. 20 U.S.C. § 107b(2) (emphasis added). Even though the 1974 amendments were intended to expand opportunities for blind vendors in federal facilities, Congress at this time still clearly indicated the limited scope of the Act by its mandate to the Commissioner of the Rehabilitation Services Administration to make annual surveys of "**concession vending** opportunities" for blind persons. 20 USC ∋ 107a(a)(2).[2] Given

[1] The inclusion of the term "services" is obviously inartful as it is followed by the same modifier that only makes sense regarding articles -- "dispensed automatically or manually and prepared on or off the premises," etc. In context, this can only refer to services incidental to the sale of the items dispensed by the vendor; there is nothing in the statute to suggest this means the sale of services to the federal agency itself. This language replaced language describing sale of articles already wrapped or in containers before they reached a vending stand. Arguably, the reference to services was to ensure that vendors could perform the incidental service of wrapping or containerizing the items they sold.

[2] In amending earlier language requiring surveys of "concession vending stands," Congress substituted the word "facilities" for "stands." It clearly forsook an opportunity to make the Act applicable to facilities that were not operating as "concessions," concessions being, in this context, licenses by the government to operate a business within government premises—not contracts to do business with the government itself. That Congress was only concerned with concession opportunities is equally apparent in the legislative history: Because Congress was not happy with the amount of vending opportunities provided by DoD, GSA, and the Postal Service, in the statute itself and in the accompanying Report Congress specifically exhorted those fulfilling this statutory survey requirement to focus on such **concession** opportunities within these three agencies. See S. Rep. 93-937, at p.17 [TAB A]. There was no hint that Congress was at all concerned with anything but concessions.

such statutory language, the conclusion that the Act covers military dining facilities, which are not concessions and in which nothing is vended, is not justifiable.

The term "cafeteria" is not further defined in the Act. As noted above, section 107d-3(e) directs the Secretary of Education to prescribe regulations to ensure that a blind vendor have a priority to operate a cafeteria when it can be done at a reasonable cost with food of a high quality comparable to that previously made available to employees. The regulation defines a cafeteria as "a food dispensing facility capable of providing a broad variety of prepared foods and beverages (including hot meals) primarily through use of a line where the **customer** serves himself from displayed selections." 34 C.F.R. § 395.1(d) (emphasis added). A "customer," in the ordinary sense and usage of the word, is one who purchases a commodity. Webster's Ninth New Collegiate Dictionary, (1983). Even with the word "customer" in the regulatory definition, however, the failure of the regulation to restate the legislative characterization of cafeterias as one type of a **vending** facility (see 20 U.S.C. § 107e(7), *supra*), has led some to overlook that overriding description of the scope of the Randolph-Sheppard Act, resulting in the erroneous view by some that the Act applies to dining facilities wherein no food is vended to customers.

When the Act was expanded in 1974 to allow blind vendors to "operate cafeterias" in federal facilities in addition to smaller stands, snack bars, and vending machines, the Congressional concern regarding cafeterias was to ensure that the blind vendors only be provided this advantage in serving the relatively captive employee market if they could provide quality food at a reasonable price to the employees. See S. Rep. No. 93-937, 93d Cong., 2d Sess., pp. 21, 24, 30 [TAB A]. This resulted in final modification to the bill to ensure that high quality food in cafeterias is provided to employees at a reasonable cost. There is not a scintilla of evidence in the legislative history that Congress itself envisioned giving state-licensed blind entrepreneurs a priority to provide by contract the service of cooking and dishing out food that already had been purchased by the agency in support of its mission and was being fed to personnel who were entitled to get that food as part of their compensation rather than buying it out of their own funds.

Some, who have endeavored to demonstrate that the legislative history suggests an intent on the part of Congress to cover military mess halls, are just plain wrong. In the 1974 report accompanying the Bill, Congress did express concern that Defense Department facilities were not adequately supporting the Randolph-Sheppard program, and cited as an exception the case of a Marine Logistics Base in Albany, Georgia, where a number of cafeterias were being operated under the program. See S. Rep. No. 93-937, pp. 16-17 [TAB A]. This facility, however, was then and still is an operation staffed primarily by civilian employees. Congress was referring to typical concession cafeterias and snack bars on the base for serving those employees, not military mess halls serving food without charge to eligible military personnel. (See Georgia v. Bell, 528 F. Supp.17 (N.D. Ga. 1981), indicating the nature of the cafeterias and snack bars being operated by blind vendors at that Marine facility in 1973 under "license" agreements.)

One Defense Department witness, Lieutenant General (Ret.) Benade (Assistant Secretary for Personnel Policy, not an official responsible for procurement), in the context of expressing reservations about potential expansion of the Act, made a statement suggesting it could be construed to cover mess halls. Hearings of the Senate Subcommittee on the Handicapped on S. 2581, Randolph-Sheppard Act for the Blind

Amendments of 1973, at p. 100, [TAB B]. This statement by a witness has wrongly been relied upon by some to suggest it provides evidence of the intended scope of the Act. In giving guidance on interpreting statutes applicable to the expenditure of appropriated funds, the GAO has pointed out the general rule that such statements by witnesses have virtually no bearing on discerning the intent of Congress. GAO Office of General Counsel, Principles of Federal Appropriations Law, *supra*, Ch. 2, pp. 68-69. In discerning legislative intent from the legislative history, GAO observed:

> Hearings occupy the bottom rung on the ladder [below committee reports and floor debates]. ... As legislative history ... they are the least persuasive form. The reason is that they reflect only the personal opinion and motives of the witness. It is impossible to attribute these opinions or motives to anyone in Congress, let alone Congress as a whole, unless more authoritative forms of legislative history expressly adopt them. As one court has stated, an isolated excerpt from the statement of a witness at hearings "is not entitled to consideration in determining legislative intent." Pacific Ins. Co. v. United States, 188 F.2d 571, 572 (9th Cir. 1951). "It would indeed be absurd," said another court, " to suppose that the testimony of a witness by itself could be used to interpret an act of Congress. " SEC v. Collier, 76 F. 2d 939, 941 (2d Cir. 1935).

Id. There is nothing in the colloquy that followed General Benade's statement or in the final enactment to suggest that Congress itself intended that military mess halls would be covered by the expanded Act.[3]

It is almost inconceivable to any student of the legislative process that Congress could have intended in 1974 to expand the scope of the Randolph-Sheppard Act from a statute mandating certain concession opportunities, for selling items to purchasing customers, to one mandating that federal agencies procuring mission-related services with appropriated funds provide a contractual preference to state licensed blind vendors. There is no hint that the Act was being expanded to apply to the spending of tax dollars via agency procurements. There was no discussion at all of the appropriated fund contracting process and the myriad of statutory and regulatory requirements and preferences already applicable to that process. None of the Congressional Committees responsible for oversight of the appropriated fund procurement process were included in the 1974 amendment process. No testimony was received from Executive Branch witnesses responsible for managing this appropriated fund procurement process or from the various socioeconomic groups whose existing federal procurement priorities might be displaced by such a new priority. Had there truly been an intent to create a new preference or "set-aside" program in federal procurements, surely there would have been some debate on the benefits to be derived from creating such a preference for a single vendor, some discussion of the specified percentage of the work that must be performed by the vendor or similarly disabled employees, some procedures for assisting the "newly enfranchised" federal contractors in dealing with the complexities of the federal procurement system—as has occurred in other appropriated fund priority

[3] Indeed, the essence of Gen. Benade's comment regarding mess halls was a recommendation to include wording that would preclude any implication that the Government might be compelled to contract for activities that need to be handled as "direct Government operations." Congressional questions following the General's testimony focused, however, on nonappropriated fund vending from which proceeds are made available to service member morale and welfare funds. See Hearings on S. 2581, [TAB B] at pp. 100-102.

programs such as the Javits-Wagner-O'Day program. There was, however, no such analysis in the legislative record because no such new federal procurement program, governing how appropriated funds should be expended, was contemplated.[4] Indeed, after the President vetoed the bill on other grounds, when it was reintroduced, Congressman Quie from Minnesota, the ranking minority member of the House Committee on Education and Labor, one of the bill's primary advocates, urged his colleagues to override the veto, emphasizing the following:

> The Randolph-Sheppard legislation authorizes the establishment of vending stands to be operated by the blind in or on Federal buildings and installations. **I must stress to my colleagues that the Randolph-Sheppard legislation requires appropriated dollars only for administrative costs. The stands operated by the blind are self-sustaining.**

Congressional Record—House, November 20, 1974, p. 36614, at p. 36616 [TAB C] (emphasis added).

For almost twenty years after the 1974 amendments, to the best of my knowledge, the Department of Education did not seek to suggest that the Act should apply to dining facilities such as military mess halls where food is not sold, that is, "vended," to customers. More importantly, there is no hint that Congress was concerned during those decades that the Act was not being applied in such situations. In the early 1990s, however, after the State of Mississippi had expressed interest in having one of its Randolph-Sheppard licensees operate a dining facility at Keesler Air Force Base, some officials in the DoD Office of Personnel Support, Families, and Education, which is not responsible for directing our appropriated fund procurement process, concluded that military dining facilities constitute "cafeterias" within the meaning of the Randolph-Sheppard Act. See Maj. Gen. Joyce memorandum at TAB D ("overruling" what I view as an accurate assessment of the law by the office of the Assistant Secretary of the Air Force for Acquisition, also at TAB D). One member of Congress rightly questioned the validity of that conclusion, but was, in my view, erroneously rebuffed. See letter from Congressman Lancaster and reply from Deputy Assistant Secretary Woods, at TAB E.

Implicit in the recent guidance to the Army acquisition community from Dr. Oscar, the ASA(RD&A), [TAB F] is the opinion that the conclusion of those DoD officials, who were not responsible for interpreting and applying appropriated fund procurement laws and regulations, was erroneous. I am similarly of the opinion that those officials' conclusion was erroneous. By focusing on the regulatory definition of the word "cafeteria" in isolation, as a place where food is dispensed, they ignored the fact that the word "cafeteria" in the statute is a subset term under the general statutory description of "vending" facilities—a fact which the Department of Education, on whom they relied, also continuously chooses to ignore. Thus, they ignored the overall legislative intent of the

[4] Having heretofore noted the limited value of witness statements at legislative hearings, it still bears noting that blind vendors themselves did not expect to become federal contractors. The Statement of the General Counsel for the State Agencies for the Blind emphasized that the 1974 legislation was merely aimed at making the program work better, stating, "S. 2581 provides for no radical change or modification of the existing Randolph-Sheppard program. . . . The bill before this subcommittee contains no new expression of legislative intent. S. 2581 simply requires that all concerned parties exercise more good faith in giving fuller effect to the intention declared by Congress 37 years ago." Hearings on S. 2581, [TAB B] at pp. 22-23.

Randolph-Sheppard Act to cover "vending" facilities only, not a "cafeteria" in which food already owned by the Government is served without charge to eligible service members.

Following the guidance of those DoD officials, the Air Force did procure dining facility services at Keesler Air Force Base under the Randolph-Sheppard Act. When that procurement was protested by small disadvantaged businesses claiming a priority to perform those services, the Comptroller General's Office, relying in part on the opinions of those DoD officials, did indeed support the Air Force decision and conclude that the Randolph-Sheppard Act applied to its procurement. See Department of the Air Force—Reconsideration, B-250465.6 et. al., (June 4, 1993) [TAB G]. I obviously disagree with the conclusion in that case, and aver that it, too, gave insufficient weight to the clear language and overall intent of the Randolph-Sheppard Act which make it applicable to "vending" facilities only. The Comptroller's opinion, like those of the DoD officials relied upon by the Air Force, focused only on the regulatory definition of the subset item "cafeteria." As pointed out previously, the regulatory language defining "cafeteria" simply clarifies what type of a food vending facility is covered by that term. It does not justify treating the overarching term "vending" in the statute as a nullity—particularly in light of the repeated references in the Act to methods of selling items within its scope.

Although the Comptroller expressed deference to the Department of Education because it is responsible for implementing the statute, the statute only allows that agency to define "cafeteria" within the framework of the concession vending program covered by the law. When expanding the Act in 1974, Congress paid a lot of attention itself to the types of vending facilities (listing "stands" and "carts" and "shelters" and "counters" and "snack bars" as well as "cafeterias") to be covered by the act. It did not leave any "gaps" in these areas which it was relying upon the agency to fill in based on any particular agency expertise. Regarding cafeterias, the only area that Congress left for the agency to prescribe was the procedure for implementing the priority for blind licensees.[5] Moreover, Department of Education's definition of cafeteria, in truth, is no more than a restatement of the typical definition found in any dictionary, a definition reflecting nothing more than ordinary knowledge of what a cafeteria is. In such circumstances, the Department of Education is entitled to no deference on the issue of whether a non-vending cafeteria is within the scope of the Act. See generally Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

Indeed, as written, there is nothing in the regulatory definition of "cafeteria" to suggest it was intended to cover "non-vending" cafeterias. The Department of Education has not even published a rule to that effect in accordance with the Administrative

[5] As you know, the Department has implemented this "priority" with a regulatory scheme that essentially requires making award to a blind licensee who is in the competitive range, at whatever price, unless the Department of Education agrees with the agency decision that the licensee's cost is unreasonable or that it is unable to provide food of a high quality. See 34 C.F.R ∋ 395.33. Applying this scheme to appropriated fund procurements has, and I submit--even under the new FAR Part 15 rules allowing "narrower" drawing of the competitive range—will continue to, cost DoD millions of dollars annually over better priced, and often better qualified, food service offerors. While the Small Business Act and other preference programs specifically prescribed for appropriated fund procurements can require award to an offer that does not necessarily provide the best value we could obtain through full and open competition, in my opinion there is no justification for spending agency funds in such a manner without a clear statutory mandate, without direction from the Office of Federal Procurement Policy, without a rule that was published and subject to public comment in accordance with the Administrative Procedure Act.

Procedure Act (5 U.S.C. ∋ 553), but instead--by correspondence and action authorizing arbitration on this issue--has demonstrated that it now interprets the Act to cover non-vending cafeteria services procured by agencies, thus displacing the priorities of other entities set forth in appropriated fund procurement statutes and the Federal Acquisition Regulations. Such "interpretive" policy decisions by the Department, which significantly affect the rights of others in securing contracts from the federal government and which have not been subject to public comment, should be given no weight. Moreover, in my opinion, it would be beyond the authority of the Department of Education to broaden the scope of the Act by regulation to cover non-vending facilities, because "[a]n agency cannot extend the meaning of the statutory language to situations not intended to be covered by the statute." See Sutherland on Statutes and Statutory Construction, ∋49.05, at p. 21.[6] The Act simply cannot reasonably be construed to cover "cafeterias" in which foodstuffs are not vended.

/S/
ARTHUR L. PASSAR
LTC, JA
Chief, Logistics & Contract Law Branch

[6] As you may be well aware, the Department of Education first started articulating its view that the Randolph-Sheppard Act takes priority over other statutory procurement priorities in a dispute (still ongoing) with the President's Committee for the Purchase from the Blind and Severely Disabled, the Government entity charged with implementing the Javits-Wagner-O'Day Act, which mandates procurement of services from qualified nonprofit agencies for the severely disabled when a service is placed on the Committee's "Procurement List." 41 U.S.C. ∋∋ 46-48c. I have explained in my brief in the recent Alaska arbitration why the Department of Education's position that its statute takes priority over the Javits-Wagner-O'Day Act is based on the false assumption that the Randolph-Sheppard Act applies to appropriated fund procurements. In any event, Sutherland's treatise on statutory interpretation points out: "An agency decision interpreting a statute is not entitled to deference when it interprets another statute or resolves a conflict between its own statute and that of another agency." Id.